UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

IN RE:	)	
	)	
CRAIG M. KINGEN, and	)	
CHRISTINE L. KINGEN,	)	**No. 01-84275**
	)	
Debtors.	)	
	)	
CRAIG M. KINGEN, and	)	
CHRISTINE L. KINGEN,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Adv. No. 03-8020**
	)	
JOHNSON, BUNCE & NOBLE, P.C. and	)	
PROCTOR HOSPITAL,	)	
	)	
Defendants.	)	

O P I N I O N

Before the Court are the motions for summary judgment filed by the Defendants, Johnson, Bunce & Noble, P.C. and Proctor Hospital (individually referred to as "J, B & N" and "PROCTOR" or collectively referred to as "DEFENDANTS"), on the complaint filed by the Debtors, Craig M. Kingen and Christine L. Kingen (individually referred to as "CRAIG" and "CHRISTINE" or collectively referred to as "DEBTORS"), for willful violation of the automatic stay.

Prior to the bankruptcy filing, PROCTOR, represented by J, B & N, had filed a collection action in state court against CRAIG for unpaid medical bills. A default judgment was entered on June 20, 2001, in the amount of $2,112.94. On September 4, 2001, in order to collect on the judgment, PROCTOR filed a Citation to Discover Assets which was set for hearing on October 24, 2001.

The DEBTORS filed a Chapter 7 petition on October 9, 2001. The DEBTORS scheduled PROCTOR as holding several unsecured claims and included J, B & N on their schedule of unsecured creditors as a prepetition collector. The bankruptcy file reflects that on October 11, 2001, the Bankruptcy Noticing Center mailed a copy of the "Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines" to both PROCTOR and J, B & N, by first class mail, postage prepaid. The notice to PROCTOR was mailed to 5409 N. Knoxville Ave., Peoria, IL 61614 and the notice to J, B & N was sent to P. O. Box 345, Peoria, IL 61651.[1] When CRAIG failed to appear at the October 24th citation hearing, PROCTOR obtained an order for body attachment, to secure CRAIG'S arrest. CRAIG was arrested at his home on October 28, 2001. CRAIG posted a $100.00 bond and was released. The next day, an employee of the attorney representing the DEBTORS called J, B & N to advise it of the arrest and of the bankruptcy filing. J, B & N then immediately contacted the state court clerk to secure the release of the bond. The bond money was returned to the DEBTORS approximately one and one-half weeks later. The DEBTORS received a Chapter 7 discharge on January 14, 2002. On that same date, a final decree was entered and the bankruptcy case was closed.

One year later, the DEBTORS, represented by new counsel, filed this complaint for contempt and sanctions for violation of the automatic stay against the DEFENDANTS,

[1] In its motion for summary judgment, J, B & N asserts that the address used by the DEBTORS is incorrect, stating that its proper address at that time was 411 Hamilton Boulevard, Suite 1900, not Post Office Box 345, which was a separate mailing address used for another collection client, not for PROCTOR. Kimberly McCollum, an employee of J, B, & N, attests to this fact in her affidavit. The Court notes, however, that J, B & N was not, itself, a creditor. The DEBTORS were not required to list J, B & N on their schedules or the creditor matrix but did so, presumably, to ensure that notice of the bankruptcy filing went directly, without delay, to the attorneys attempting to collect the judgment for PROCTOR.

seeking actual and punitive damages and attorney fees.[2] In answer to the complaint, both J, B & N and PROCTOR denied having any notice of the DEBTORS' bankruptcy prior to October 29, 2001. J, B & N and PROCTOR have filed separate motions for summary judgment, contending that their lack of notice of the bankruptcy proceeding precludes a determination that they willfully violated the automatic stay. While both DEFENDANTS acknowledge the presumption of receipt which arises from a properly addressed, mailed notice , they each contend that the presumption is rebutted by affidavits of their employees, and that in the absence of any direct evidence that the notice was actually received, they are entitled to judgment as a matter of law.

Summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment will be granted only where it is clear that there is no dispute about the facts or inferences to be drawn therefrom. *Central Nat. Life Ins. Co. v. Fidelity and Deposit Co. of Maryland*, 626 F.2d 537 (7th Cir. 1980). On a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. *In re Chambers*, 348 F.3d 650 (7th Cir. 2003). It is not the role of the trial court to weigh the evidence or to determine its credibility, and the moving party cannot

[2] The Bankruptcy Code does not contain a statute of limitations for the bringing of a claim under Section 362(h) and courts have permitted debtors to bring such actions well after the underlying bankruptcy case has been closed or dismissed. *See, Price v. Rochford*, 947 F.2d 829 (7th Cir. 1991); *In re Bernheim Litigation,* 290 B.R. 249 (D.N.J. 2003).

prevail if any essential element of its claim for relief requires trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Section 362(a) of the Bankruptcy Code, which provides for an automatic stay of the commencement or continuation of all judicial proceedings previously commenced against the debtor, is one of the most basic protections provided by bankruptcy law. *In re Grogg*, 295 B.R. 297 (Bankr.C.D.Ill. 2003). The automatic stay is self-executing and takes effect when the petition is filed, regardless of whether a creditor has knowledge of the bankruptcy. *Aiello v. Providian Financial Corp.*, 239 F.3d 876 (7th Cir. 2001). In Chapter 7 cases, the stay remains in effect until the case is dismissed, closed or a discharge is granted or denied. 11 U.S.C. § 362(c)(2). Section 362(a) not only imposes a stay of post-petition actions against a debtor, it requires a creditor to act affirmatively to halt or reverse proceedings, begun pre-petition, which, if allowed to continue post-petition, would violate the stay. *In re Walters,* 219 B.R. 520, 526 (Bankr.W.D.Ark. 1998); *In re Siskin,* 231 B.R. 514 (Bankr.E.D.N.Y.1999). A debtor injured by a willful violation of the stay is entitled to actual damages, including attorney fees and, in appropriate cases, punitive damages. 11 U.S.C. Section 362(h).

A willful violation of the stay does not require a specific intent to violate the stay. Rather, the Bankruptcy Code provides for damages upon a finding that the defendant had notice of the stay and the defendant's actions were intentional. *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.,* 337 F.3d 314 (3rd Cir. 2003); *In re Welch,* 296 B.R. 170 (Bankr.C.D.Ill. 2003). A creditor's subjective state of mind or intent to violate the stay is not

relevant to the issue of whether a violation was willful. *In re Dyer,* 322 F.3d 1178 (9th Cir. 2003). It becomes relevant only upon consideration of an award of punitive damages. *In re Stinson,* 295 B.R. 109 (9th Cir. BAP 2003). A corporate creditor's actual knowledge of the bankruptcy filing, gained by having an employee actually open and read the notice, is not a prerequisite to a finding of willfulness. Since creditors are charged with having procedures in place to properly and timely process bankruptcy notices, receipt of the notice by the creditor is all that is required. *In re Muncie,* 240 B.R. 725 (Bankr.S.D.Ohio 1999).

Although both PROCTOR and J, B & N acknowledge that their actions were in violation of the automatic stay, they contend that those actions, taken without knowledge of the bankruptcy filing, do not constitute a willful violation of the stay, for purposes of the DEBTORS' recovery under Section 362(h). In support of its motion for summary judgment, PROCTOR submits the affidavit of Jim Hayes, the employee in patient accounts responsible for receiving bankruptcy notices at the time in question. Mr. Hayes attests to PROCTOR'S standard procedure of advising its attorney upon receipt of a bankruptcy notice. Mr. Hayes states that was he familiar with the DEBTORS' account and that no notice of bankruptcy was contained in the DEBTORS' file prior to October 29, 2001.

In support of its motion, J, B & N has submitted the affidavits of all three employees in its collection department. Those affiants acknowledge that J, B & N handles "thousands" of collection matters each year and receives "hundreds of bankruptcy notices and pleadings each month." Wilma Brinker, a paralegal, states that the law firm's standard procedure is to place a copy of the bankruptcy notice in the debtor's file and to circulate a copy to each

attorney and collection specialist. Linda Pope, the collection specialist charged with overseeing the DEBTORS' account, states that she did not receive notice of the DEBTORS' bankruptcy prior to his arrest. Kimberly McCollum, the collection specialist responsible for processing the mail sent to Post Office Box 345, attests that she did not receive a notice of the DEBTORS' bankruptcy filing.

J, B & N also submits the affidavit of Michael Hall, a partner in the law firm, as well as the head of the litigation department. He states that the collection file did not contain a notice of bankruptcy prior to the date of CRAIG'S arrest and that the law firm had no notice of the bankruptcy filing until the following day. Common to all four affidavits is the allegation that "[a]t no time prior to the entry of the Order for Body Attachment did [the affiant] ever receive a copy of any bankruptcy filings on behalf of the debtors in this case."[3]

In response to the motions, the DEBTORS rely upon the long-standing presumption that a notice, properly addressed, stamped and mailed to the addressee has been received. *See, Hagner v. U.S.*, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932); *In re Nimz Transp., Inc.*, 505 F.2d 177 (7th Cir. 1974). The DEBTORS contend that the presumption is strengthened by their attorney's receipt of the same bankruptcy notice on October 20, 2001. The DEBTORS discredit the affidavits submitted by the DEFENDANTS, suggesting that the similarities between the crucial portions of each affidavit reflect a lack of individualized knowledge and, that the affidavits, viewed collectively, are insufficient to rebut the presumption of

[3] The affidavits do contain slight variations. The affidavit of Mr. Hall recites that no such notices were received by him "or any other attorney" in the law firm. The affidavits of both Ms. Brinker and Ms. McCollum deny receipt of notice "through that Post Office Box or any other mail received by [them]."

receipt. They support their accusations by attaching the deposition of Mr. Hall and a portion of Ms. McCollum's deposition. Consistent with his affidavit, Mr. Hall verified that the address listed for J, B & N was a correct address, although the post office box was for mail for a different client. Contrary to the statements made in her affidavit, Ms. McCollum, the J, B & N employee who collects the mail from the post office, testified that Post Office Box 345, listed on the Certificate of Service, was not one of the three post office boxes used by the law firm. The DEBTORS also submit a portion of the deposition of Mr. Hayes, wherein he admited that he actually does not recall any conversations with anyone at J, B & N regarding the immediate seeking of the refund of the DEBTOR'S bond money, but, as a matter of procedure, that step would have been taken.[4]

PROCTOR filed a memorandum in reply, attaching the depositions of Mr. Hayes and Mr. Hall.[5] In his deposition, Mr. Hayes testified that the mail clerks who opened the mail were instructed to forward all mail related to patient accounting, including notices from a bankruptcy court, to him. He testified that when he received a bankruptcy notice on an account that was in collection status, he would fax a copy of the notice to a designated legal assistant in the law firm and place the notice in the file and close it. Mr. Hayes testified that a return fax would be received from the law firm, acknowledging receipt of the bankruptcy notice.

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[4] The DEBTORS also submit CRAIG'S affidavit in substantiation of damages. The DEFENDANTS' motions for summary judgment do not broach that issue. If the DEBTORS seek compensatory damages, they will need to prove those up at trial.

[5] J, B & N also filed a reply brief, adopting only the portion of PROCTOR'S brief setting forth the material facts, both those not disputed by PROCTOR and those claimed by the DEBTORS which PROCTOR disputes. No additional evidentiary materials were submitted.

In his deposition, Mr. Hall testified that in October, 2001, the firm handled approximately 300 accounts for PROCTOR. Mr. Hall verified that upon receipt of a bankruptcy notice the collection process would cease and PROCTOR would be notified. He testified that the communication between J, B & N and PROCTOR regarding the receipt of a bankruptcy notice by either of them would ordinarily occur that same day. J, B & N had a procedure in place at that time, whereby each attorney would review all of the bankruptcy notices received by the law firm every seven to ten days.

Based on the certificate of service showing that the bankruptcy notice was mailed to PROCTOR and J, B & N, the DEBTORS are entitled to the presumption of receipt.[6] Contrary to the DEFENDANTS' arguments, the affidavit testimony does not prove that the notice was not received. Denial of receipt alone does not conclusively rebut the presumption. *In re Longardner & Associates, Inc.*, 855 F.2d 455 (7th Cir. 1988); *In re Robinson*, 228 B.R. 75 (Bankr.E.D.N.Y.1998). To the extent that the testimony of the employees of PROCTOR and J, B & N attempts to establish a standardized procedure for processing mail, it falls short of the mark.[7] Insufficient detail as to the collection and opening of the mail was given. But even if this Court would consider such testimony to suffice, rebuttal of the presumption

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[6] This is so notwithstanding the contradictions regarding the post office box number used for J, B & N.

[7] In his affidavit, Mr. Hayes states only that "[t]he standard procedure for handling bankruptcy notices is that once Proctor receives a copy of a bankruptcy notice, it would contact its attorneys, in this case, Johnson, Bunce & Noble, to advise them of the bankruptcy notice." In his deposition, he states that each mail clerk was instructed to forward all patient accounting related mail to him. He identified himself as the individual at PROCTOR who handled "all credit and collection for the hospital on any type of patient account." When asked what course of action he took upon receiving a bankruptcy notice, Mr. Hayes responded as follows:

> If the account was in legal where it was with the hospital attorney, we would fax the bankruptcy notice to the attorney's office so that they could cease all action. Then we would take the notice and put the same information on the individual's file at the hospital and close it.

The Court cannot presume that when Mr. Hayes used the term "we" he was referring only to himself.

serves only to create a material issue of fact. *Robinson,* 228 B.R. at 82.[8] The DEBTORS, at this stage, need not present evidence to show that the notice was in fact received.

The issue of the DEFENDANTS' knowledge or notice of the DEBTORS' bankruptcy is clearly a disputed issue of fact and cannot be decided as a matter of law, but requires an evidentiary hearing in order to resolve the factual dispute. Both PROCTOR and J, B & N have presented evidence that their standard procedures, if followed here, would have resulted in a copy of the bankruptcy notice being placed in their files. They have also presented evidence that their files did not contain the notice prior to October 29, 2001. The credibility of the witnesses and the weight to be given that testimony is for the Court alone to determine. If, however, that testimony is accepted by the Court at trial, four possible scenarios emerge: first, that the notices were not in fact mailed by the Bankruptcy Noticing Center; second, that the notices were mailed but never actually received by PROCTOR and/or J, B & N; third, that the notices were received but were negligently lost, misplaced or improperly processed in contravention of their standard procedures; and fourth, that the notices were received but were intentionally ignored and wrongfully destroyed or disposed of. In order to prevail, the DEBTORS must prove by a preponderance of the evidence either the third or the fourth sequence of events.

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[8] Addressing this issue, the court in *Robinson* noted:

> Although the mere denial of receipt does not rebut the presumption, testimony denying receipt in combination with evidence of standardized procedures for processing mail can be sufficient to rebut the presumption. *See In re Cassell*, 206 B.R. 853, 857 (Bankr.W.D.Va. 1997); *Shawnee State Bank v. First National Bank of Olathe (In re Winders)*, 201 B.R. 288, 290 (D.Kan. 1996); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dodd (In re Dodd)*, 82 B.R. 924, 928-29 (N.D.Ill. 1987). Where a presumption has been rebutted, the judge must weigh the evidence to determine whether the party did, in fact, receive notice. *See Nunley v. City of Los Angeles*, 52 F.3d 792, 796 (9th Cir. 1995), *cert. denied*, 522 U.S. 1091, 118 S.Ct. 884, 139 L.Ed.2d 871 (1998); *Yoder*, 758 F.2d at 1119 n. 8. A court may draw an inference of receipt from the fact that the notices were properly mailed. *See Nunley*, 52 F.3d at 796 ("the factual question of receipt may be decided in favor of receipt by a fact finder who may choose to draw inferences of receipt from the evidence of mailing, despite contrary evidence"); *Yoder*, 758 F.2d at 1119 n. 8 ("the facts giving rise to the presumption often give rise to an inference that may still be considered by the factfinder").

Even though, at this stage, the record is lacking any direct evidence to support the third or fourth scenario, the Court is required to draw from the uncontradicted facts those inferences that are most favorable to the DEBTORS as the nonmoving party. *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 520, 111 S.Ct. 2419, 2434-35, 115 L.Ed.2d 447 (1991). Accordingly, because the established facts give rise to the third and fourth inferences, as possibilities, which, if proved by a preponderance of the evidence, would entitle the DEBTORS to judgment, the Court must accept those inferences and deny the DEFENDANTS' motions. At trial, of course, the DEBTORS will be put to their proof and, in the absence of evidence to support the third or fourth scenario, are unlikely to prevail.

The DEFENDANTS' Motions for Summary Judgment will be denied. This Opinion constitutes this Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate Order will be entered.

Dated: February 17, 2004.

THOMAS L. PERKINS
UNITED STATES BANKRUPTCY JUDGE

Copies to:
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Michael A. Hall, Attorney for Johnson, Bunce & Noble, 411 Hamilton Blvd., Suite 1900, Peoria, Illinois 61602
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U.S. Trustee, 401 Main Street, Suite 1100, Peoria, Illinois 61602

UNITED STATES BANKRUPTCY COURT
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JOHNSON, BUNCE & NOBLE, P.C. and	)	
PROCTOR HOSPITAL,	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in an Opinion filed this day, IT IS HEREBY ORDERED that the Motions for Summary Judgment filed by the Defendants, Johnson, Bruce & Noble, P.C. and Proctor Hospital, are DENIED.

The Bankruptcy Clerk shall set this case for a telephonic pretrial conference.

Dated: February 17, 2004.

THOMAS L. PERKINS
UNITED STATES BANKRUPTCY JUDGE

Copies to:
Daniel A. Edelman
Michael A. Hall
Roger R. Clayton
Mark A. Ludolph
U.S. Trustee